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In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES J. RESHA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the federal wiretap statute forbids the use of certain search warrant evidence to support the Commissioner's assessments of wagering excise taxes.

1. Petitioners were the subject of an FBI investigation into a gambling operation that was suspected to be in violation of 18 U.S.C. 1084 and 1955 (Pet. App. A12 n.2). As part of that investigation, FBI agents secured a court order authorizing the interception of certain telephone conversations pursuant to the federal wiretap statute, 18 U.S.C. 2510 *et seq.* Based upon information obtained through those court-authorized wiretaps, the FBI agents sought and obtained search warrants for petitioners' premises. The agents executed the warrants and seized various documents related to gambling activities. Pet. App. A2, A12.

Although petitioners were not criminally prosecuted for any gambling offenses, there was considerable newspaper publicity surrounding the search. As a result of that

publicity, agents from the Excise Tax Division of the Internal Revenue Service communicated with the FBI and requested permission to photocopy the documents that the FBI had seized. That permission was granted. Based on the photocopied documents, the IRS made wagering excise tax assessments against petitioners. Pet. App. A2, A12.

Petitioners eventually paid a portion of the assessments and, upon denial of their claims for refund, filed these refund suits in the United States District Court for the Middle District of Tennessee (Pet. App. A2, A12-A13). The government counterclaimed for the unpaid balance of the tax assessments, for civil fraud penalties, and for interest (*id.* at A13). Petitioners moved for summary judgment, contending that the wiretap data, while lawfully intercepted by the FBI, had been unlawfully disclosed to the IRS. Petitioners further contended that the proper remedy for this allegedly improper disclosure was suppression of the search warrant evidence and that, lacking the search warrant evidence, the IRS tax assessments were unsupportable. The government "conceded that without [such] evidence it could not establish additional wagering tax liability" and hence agreed that petitioners' motion for summary judgment was ripe for decision (*id.* at A4, A13). The government did not file a cross-motion for summary judgment.

The district court ruled for petitioners (Pet. App. A11-A24). It held that the wiretap data had been unlawfully disclosed by the FBI to the IRS in violation of 18 U.S.C. 2517 (Pet. App. A13-A18), and it concluded that the prescribed statutory remedy for that disclosure was suppression of the search warrant evidence pursuant to 18 U.S.C. 2515 (Pet. App. A18-A23). In view of the government's concession that the IRS had no other evidence to support its wagering tax assessments, the court granted summary judgment to petitioners on their refund claim.

The court of appeals unanimously reversed (Pet. App. A1-A10). It found no need to decide whether the FBI's disclosure of the wiretap data was unlawful (*id.* at A6). Rather, it held that Section 2515 authorizes suppression only where the wiretap *interception* is unlawful for one of the reasons specified in Section 2518(10)(a), and not (as here) where lawfully-intercepted wiretap data are allegedly disclosed in violation of Section 2517 (Pet. App. A6-A10). The court did not reach the government's other arguments.[1] The court of appeals accordingly reversed the judgment of the district court and "remanded [the case] for further proceedings consistent with [its] opinion" (Pet. App. A10).

2. Petitioners here reiterate their contention that 18 U.S.C. 2515 mandates suppression of the search warrant evidence. Whatever the merits of petitioners' contention, it is not now ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied had the district court in the first instance denied their motion for summary judgment; appellate review could not have been obtained prior to trial on the merits of their refund claims and of the government's counterclaims. Both the question of petitioners' correct tax liabilities for the years at issue, and the question of their liability for civil fraud penalties, remain to be decided on remand. If petitioners prevail on remand, the claim they seek to present here will be moot. If, on the other hand, the government prevails in whole or in part on

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[1]The government alternatively argued that, because the IRS had relied solely on the documents seized by the FBI pursuant to the search warrants, the dissemination and use of those documents was not governed by the federal wiretap statute at all. And the government contended that suppression was inappropriate in any event because the search warrant evidence had been disclosed voluntarily by petitioners Dickens and Scott when they attached those documents as an exhibit to their complaint in a previous injunction action. Appellant's C.A. Br. 7, 25.

remand, and if the government's position is sustained on appeal, petitioners will then be able to present their claim, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

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[2]Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will do so if the Court requests.

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